IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 82-5147

CHARLES LAVERNE SINGLETON,

Petitioner

vs.

STATE OF ARKANSAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

APPENDIX

JEFFREY M. ROSENZWEIG
420 Three Hundred Spring Bldg.
Little Rock, Ark. 72201
(501) 372-5247

Attorney for Petitioner,
pro hac vice

SUPREME COURT OF ARKANSAS

No. CR80-69

Opinion Delivered OCT 26 1981

CHARLES LAVERNE SINGLETON,

APPELLANT,

V.

STATE OF ARKANSAS,

APPELLEE.

AN APPEAL FROM ASHLEY CIRCUIT COURT; PAUL K. ROBERTS, JUDGE.

AFFIRMED IN PART; REVERSED IN PART.

RICHARD B. ADKISSON, Chief Justice

On October 30, 1979, after a trial by jury, appellant, Charles L. Singleton, was sentenced to death by electrocution for capital felony murder, and life imprisonment for aggravated robbery.

We affirm the conviction and sentence for capital felony murder, but set aside the lesser included offense of aggravated robbery. Ark. Stat. Ann. § 41-105 (1)(a)(2)(a) (Repl. 1977) prohibits the entry of a judgment of conviction on capital felony murder and the underlying specified felony. Swaite v. State, 272 Ark. 128, 612 S.W. 2d 307 (1981). Generally, this Court will not consider errors raised for the first time on appeal; however, we note that the judgment in this case was entered before our decision in Swaite. In death penalty cases we will consider errors argued for the first time on direct appeal where prejudice is conclusively shown by the record and this Court would unquestionably require the trial court to grant relief under Rule 37.

The victim, Mary Lou York, was murdered in York's Grocery Store at Hamburg on June 1, 1979. She died from loss of blood as a result of two stab wounds in her neck.

The evidence of guilt in this case is overwhelming. Patti Franklin saw her relative Singleton enter York's Grocery at approximately 7:30 p.m. on the day of the crime. Shortly after he entered Patti heard Mrs. York scream, "Patti go get help, Charles Singleton is killing me." Patti then ran for help. Another witness, Lenora Howard, observed Singleton exit the store and shortly thereafter witnessed

Mrs. York, who was "crying and had blood on her," come to the front door. Police Officer Strother was the first to arrive at the scene and found Mrs. York lying in a pool of blood in the rear of the store. The officer testified Mrs. York told him that Charles Singleton "came in the store, said this is a robbery, grabbed her around the neck, and went to stabbing her." She then told Officer Strother that "there's no way I can be all right, you know I'm not going to make it. I've lost too much blood." Mrs. York was taken to the hospital in an ambulance and was attended by her personal physician, Dr. J. D. Rankin. While enroute to the hospital, she told Dr. Rankin several times that she was dying and that Singleton did it. Mrs. York died before reaching the emergency room of the hospital. Officer Strother also testified that during examination of the premises, he found a money bag on the floor near the cash register which was empty, except for about $2.00 in change. He also stated that the cash register had only a small amount of change in it.

Appellant contends the trial court committed reversible error by failing to excuse for cause veniremen Waldrup, Goyne, Taylor, and Estelle. Appellant exercised a peremptory challenge on each of these prospective jurors but made no showing of record that he would have struck any other juror who actually sat on the trial of the case had he had a peremptory challenge remaining. Under such circumstances we have consistently held that appellant has shown no prejudice since he is unable to show that an objectionable juror was forced upon him without his having the privilege of exercising a peremptory challenge. Conley v. State, 270 Ark. 886, 607 S.W. 2d 328 (1980); Arkansas State Highway Comm. v. Dalrymple, 252 Ark. 771, 480 S.W. 2d 955 (1972); Green v. State, 223 Ark. 761, 270 S.W. 2d 895 (1954). In Glover v. State, 248 Ark. 1260, 455 S.W. 2d 670 (1970) the defense in exhausting

his peremptory challenges used some of his challenges to remove unacceptable veniremen, then stated for the record that had he not been required to use his challenges on jurors that should have been excused for cause, a particular juror who was seated and actually served would have been challenged. In Glover we found that the error had been preserved and reversed the judgment.

Appellant argues for the first time on appeal that he would have exercised peremptory challenge on two specific jurors had the court granted his challenges for cause. The record does not reflect that the two jurors specified were biased or otherwise unqualified to serve. This Court has consistently held that it wil not consider alleged errors raised for the first time on appeal. Wicks v. State, 270 Ark. 781, 606 S.W. 2d 366 (1980).

Appellant next argues that the trial court erred in admitting as hearsay the statements made by the victim. The statements of the victim were admissible under two separate exceptions to the rule against hearsay. Rule 803(2), Uniform Rules of Evidence, Ark. Stat. Ann. §28-1001 (Repl. 1979) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ....
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

And, Rule 804(b)(2), Uniform Rules of Evidence provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

All of the victim's statements were related to Singleton cutting her throat and, as a result, her dying. These statements clearly fall under the excited utterance exception to the rule against hearsay since they were made under the stress of the event.

The victim cried out to Patti Franklin that Singleton was killing her. She told Officer Strother that she was not going to make it because she had lost too much blood, and she repeatedly told her physician, Dr. Rankin, that she was dying. It is clear that all of her statements were made under the dying declaration exception to the rule against hearsay. Each of these statements were made concerning the cause or circumstances of what she believed to be her impending death.

It is argued that there was no showing by the state that Mrs. York had firsthand knowledge of the identity of the appellant. This is unsupported by any reasonable view of the evidence.

Finally, appellant asserts the trial court erred in its rulings regarding photographs of the crime scene and the victim. Appellant seems to base his argument on two primary allegations: (1) that it was error to allow Chief Kennedy to refer to photographs of the crime scene previously held inadmissible as inflammatory and, (2) that the prosecutor was guilty of misconduct in attempting to introduce a photograph of the victim's body after the trial court had ruled it inadmissible, defense counsel having stipulated to the cause of death.

Chief Kennedy testified that he took the photographs when he arrived at the crime scene. He referred to the pictures to refresh his memory of the scene while testifying at the trial. The record does not disclose a specific objection regarding Kennedy refreshing his memory. Defense

counsel did state that the prosecutor's handling of the pictures was calculated to prejudice his client and asked for a mistrial. Thus, the only objection seems to be a vague allegation of prosecutorial misconduct. Rule 612, Uniform Rules of Evidence, Ark. Stat. Ann. §28-1001 (Repl. 1979) provides that a witness may refer to an object or writing to refresh his memory while testifying.

The prosecutor attempted to introduce a photograph of the victim's body to show the location of the stab wounds. Defense counsel objected on the grounds that the court had ruled the photograph of the deceased was inadmissible since defense counsel had stipulated to the cause of death. There were at least three in-chamber hearings regarding the introduction of a photograph of the deceased. The prosecutor maintained he never stipulated that the photograph should not be introduced, a position which seems to be supported by the record. The defense counsel argued that there was a stipulation that the photograph of the deceased would not be admissible and, regardless of the stipulation, the trial court's ruling should have precluded the prosecutor from attempting to introduce the photograph. The trial judge did rule that the photograph would not be admissible if the cause of death was stipulated. But, the prosecutor maintained that he did not so stipulate and that he had a right and duty to prove every essential element of the charge, and he was only attempting to show the nature and extent of the wounds and not the identity of the victim or that she was, in fact, dead.

In any event, we can say beyond a reasonable doubt that under the facts of this case no prejudice resulted to the defendant from the prosecutor's attempt to introduce a

picture of the deceased. The court sustained defense counsel's objection, and none of the pictures were ever viewed by the jury. Some confusion did exist due to the prosecutor's position that he was entitled to prove his case as fully as possible, but this confusion does not constitute reversible error.

Where life imprisonment or death was imposed in the court below, the Supreme Court reviews the entire record for errors prejudicial to the right of the appellant. Rule 36.24, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977). To facilitate this review, Rule 11(f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1979) was promulgated:

> [T]he appellant must abstract all objections that were decided adversely to him in the trial court together with such parts of the record as are needed for an understanding of the objection. The attorney general will make certain that all objections have been so abstracted and will brief all points argued by the appellant and any other points that appear to him to involve prejudicial error.

This means that both the counsel for appellant and counsel for the State must examine the record page by page to be certain that all objections are brought to the Court's attention. For many years the members of this Court made that examination in capital cases before the rule was amended to read as it does now. Earl v. State, 272 Ark. 5, 612 S.W. 2d 98 (1981); Curry v. State, 270 Ark. 570, 605 S.W. 2d 748 (1980).

We have examined all objections and find no error.

Affirmed in part; reversed in part.

Hickman and Dudley, J.J., dissent in part.

THIS IS A CAPITAL CASE
EXECUTION IS IMMINENT

IN THE SUPREME COURT OF ARKANSAS

CHARLES LAVERNE SINGLETON — PETITIONER

VS. CR 80-69

STATE OF ARKANSAS — RESPONDENT

ORIGINAL PETITION FOR PERMISSION TO PROCEED PURSUANT TO RULE 37, A. R. CRIM P.

Comes the Petitioner, Charles Laverne Singleton, through his attorney, Jeff Rosenzweig, serving pro bono publico, and for his petition states:

1. Petitioner was charged with capital murder and aggravated robbery in Ashley Circuit Court. After trial by jury, Petitioner was convicted of both charges and sentenced to death on the capital murder conviction and life imprisonment for aggravated robbery. On appeal, the Arkansas Supreme Court affirmed the capital murder conviction and sentence, but vacated the conviction of aggravated robbery on double jeopardy grounds. Singleton v. State, 274 Ark. 126 (1981). Certiorari was denied by the United States Supreme Court.

On May 10, 1982, Governor White designated June 4, 1982 as Petitioner's execution date. Petitioner is filing a petition for stay of execution pending disposition of the merits of this petition.

2. This Court has promulgated, through Rule 37 of the Arkansas Rules of Criminal Procedure, an avenue of post-conviction relief.

3. This petition, being filed within three years of Petitioner's conviction and commitment in October, 1979, is timely filed. Rule 37.2(c).

4. Petitioner is cognizant of numerous opinions of this Court regarding the proper scope and nature of Rule 37. Petitioner has attempted to organize this Petition in such fashion as to not be "speculative" as defined by this Court. Petitioner, however, would also point out that (i) should this petition be unsuccessful, it is incumbent on counsel to

seek relief by means of a writ of habeas corpus in the federal court; (ii) that before the federal court will accept jurisdiction, Petitioner must show exhaustion of all state remedies. 28 U. S. C. 2254(b); (iii) emerging doctrine invokes the concept of waiver in federal court of any issues not raised in state court, and (iv) the nature of the relief that Petitioner seeks in the instant petition is for permission to pursue an evidentiary hearing in order that this Court may make a review of the matters alleged in this petition.

Furthermore, Petitioner would point out that he is now represented by counsel different from that at trial and direct appeal, this Court having granted that attorney's motion to be relieved. Petitioner further states that this petition is being filed in good faith and not for purpose of delay.

5. Petitioner submits that he is entitled to meaningful review, including an evidentiary hearing as provided for in Rule 37. A hearing is particularly necessary and appropriate in that a number of the issues raised deal with the ineffectiveness of trial counsel, who was also Petitioner's attorney on direct appeal to this Court. Other issues deal with matters on which the record, at this point, is either sparse or lacking. Petitioner in this pleading is making the utmost effort to identify those places in the record that support the allegations made herein, and also attaches affidavits executed by Petitioner and by his mother with regard to certain issues.

This Court has held that a post-conviction evidentiary hearing in the trial court is the appropriate forum in which to raise issues of effectiveness of counsel. The language of Hilliard v. State 531 S. W. 2d 463 (1976) is particularly illustrative and eloquent:

> Appellant's concluding assignment of error is that inadequate representation was afforded him by his retained counsel at the trial. However, this issue was not raised in the trial court and we will not consider it here since the trial court has not had an opportunity to pass upon the

appellant's contention.

> No motion for new trial was filed and the trial court is in a better position to assess the quality of legal representation through a motion for new trial or a motion for postconviction relief than we are on appellate review. Under either method the circuit court then has the opportunity to consider many facets of the cause that by necessity are denied us on appeal. An evidentiary hearing of this caliber would better equip us on review to examine in detail the sufficiency of the record below ...If the accused did not have adequate opportunity to raise the question in the trial court before appeal, he can raise the question by motion for post-conviction relief. Leasure v. State 254 Ark. 961, 497 S. W. 2d 1 (1973) and Franklin v State 251 Ark. 223, 471 S. W. 2d 760 (1971). At. 464-65.

Petitioner would further point out that at trial he was declared indigent and was represented by court-appointed counsel, and has had no opportunity to litigate the effectiveness issue.

It is an accepted proposition that the death penalty is different in kind, rather than in degree, from other punishments, and a higher standard of certainty attaches in death penalty cases. Gardner v. Florida, 430 U. S. 349 (1977). Because of that, in addition to the effectiveness issue, Petitioner seeks review and vacation of the conviction on other points as well, and an evidentiary hearing may be appropriate on certain of those issues as well.

Petitioner submits that it would be violative of his rights of due process, equal protection, fair trial, and effective assistance of counsel, under both the U. S. and Arkansas Constitutions, to deny him a hearing and an opportunity to make the necessary evidentiary record for vacation of the judgment and sentence.

6. Petitioner's allegations of ineffective assistance of counsel may be divided, like the trial itself, into voir dire, guilt phase and preparation for it, and penalty phase and preparation for it.

VOIR DIRE

At trial, Petitioner's counsel moved to excuse for cause two prospective jurors who expressed belief that the perpetrator of the homicide, whoever it was, did so in the course of a robbery. Veniremen Waldrup (T. 612-626) and

Venireman Greene (T. 626-641). Counsel moved to exclude for cause one prospective juror who favored the death penalty for all persons convicted of murder. Venireman Taylor (T. 330-351). And counsel moved to exclude for cause one who indicated that he would go along with the majority. Venireman Estelle (T. 720-730).

On appeal, this Court stated that it would not consider the failure of the trial court to exclude the four jurors for cause, because counsel did not comply with the procedural requisites for making an appellate record, i.e. designating which objectional jurors he was forced to accept because of his peremptory challenges.

Petitioner submits that his counsel was ineffective merely by his failure to protect the appellate record, but Petitioner will also demonstrate specific instances of prejudice by counsel's failure to conduct an adequate voir dire.

A. When Venireman Smith was called, Petitioner had exhausted his peremptory challenges. In voir dire the following colloquy occurred:

> MR. GIBSON: Have you ever had a close friend or a member of your family victimized by a crime such as this?
>
> PROSPECTIVE JUROR: Yes, sir.
>
> MR. GIBSON: You have?
>
> PROSPECTIVE JUROR: Yes, sir.
>
> MR. GIBSON: How long ago was that?
>
> PROSPECTIVE JUROR: About twelve years.
>
> MR. GIBSON: Twelve years. All right sir. Can you set aside your feelings with respect to that occurrence?
>
> PROSPECTIVE JUROR: Yes, sir.
>
> MR. GIBSON: And whatever emotions that you might have suffered from at the time that could have prejudiced you against the Defendant in that case--Was he brought to trial?
>
> PROSPECTIVE JUROR: It would have no effect.
>
> MR. GIBSON: But was he brought to trial?
>
> PROSPECTIVE JUROR: Yes, sir. (T. 766-767)

Petitioner's counsel did not explore this matter. Among the questions not asked of this juror are: What emotions and prejudices that you have or had are you setting

aside? What was your relationship to the victim? What were the circumstances of the killing? Were you called as a witness? Was the person charged black or white? Was he convicted or acquitted? What punishment did he receive? Did he receive the death sentence? If he did, what were your feelings about a commutation? If you were a defendant, would you want someone like you on the jury? We do not know the answers to those questions, but this juror sat on the panel that sentenced Petitioner to death.

Specifically, counsel was ineffective in not exploring the attitudes that Juror Smith may have had, considering his background of relationship to a murder victim. When peremptories have been exhausted counsel is under an especial obligation to plumb for biases, actual or implied, that would affect deliberations. Counsel was also ineffective in not challenging this juror for cause, and in not identifying him in the trial record as an objectionable juror foisted on him by exhaustion of peremptories.

B. Counsel would have been able to use a peremptory challenge on Venireman Smith but for having employed two of the twelve he was allotted on jurors who should have been challenged for cause, and with regard to whom it would have been error not to exclude. Specifically, Venirewoman Barnett (T. 370-387) was not challenged for cause even though she knew the victim; however, a peremptory was used on her. Venireman Boston (T. 419-432) stated that he would make the Defendant prove his innocence; likewise he was perempted without a challenge for cause. Counsel was ineffective in not challenging these persons for cause, or at the very least, conducting additional examination preparatory to a cause challenge. Again, Venireman Smith above, was the first person seated after exhaustion.

C. Counsel was ineffective in assenting to the prosecution's challenge for cause of Venireman Green (T. 445-454). Petitioner submits that examination of Green's voir dire indicates that he was not disqualifiable under Witherspoon v. Illinois, 391 U. S. 510 (1968).

Counsel was also ineffective in not identifying Veniremen Berry and Murphy as objectionable jurors in the trial record. These were raised for the first time on appeal.

E. Counsel was also ineffective in failing to make an adequate appellate record on the issue of racial exclusion of prospective jurors. Petitioner's affidavit reflects that the jusy that convicted him was all white. This issue will be discussed in further detail below.

F. Counsel was also ineffective in not rehabilitating, for Witherspoon purposes, a number of venirepersons excused by the Court for cause; strangely, it appears from the record that most of the Witherspoon challenges occurred at the very end of voir dire. An evidentiary hearing might determine whether that is merely coincidental or whether it happened for some other reason.

GUILT PHASE

Petitioner recognizes that, under his trial counsel's representation, certain purported statements and alleged items were excluded from evidence. Nevertheless, the record reflects that Petitioner was afforded ineffective assistance in several respects in the guilt phase of the trial.

In particular, trial counsel propounded and/or implied inconsistent theories of defense: that Petitioner did not commit the act and that the act was committed without the requisite mental state or not in the alleged circumstances. Petitioner submits that to propound inconsistent defenses, particularly in a case of this gravity, is ineffective.

Counsel was also ineffective in not pursuing a second psychiatric examination of Petitioner. The record reflects that Petitioner was diagnosed as having a severe antisocial personality but was assessed by the hospital as being fit to stand trial. Petitioner submits that it was incumbent on counsel to seek a second opinion. An affidavit of Petitioner's mother is attached stating that she had some information relating to Petitioner's problems.

Petitioner submits this might have provided additional insights for the defense of the case on a defense of mental disease or defect or diminished capacity.

Petitioner also seeks to develop an evidentiary record on various other aspects of the guilt phase and preparation for it. Petitioner submits that counsel should have investigated further, and better prepared the witnesses who did testify.

Other points regarding the guilt phase are raised elsewhere in this petition.

PENALTY PHASE

The sentence of death must be vacated for ineffectiveness of counsel at the penalty phase of the trial.

The record reflects that Petitioner's trial counsel presented no evidence on his behalf at the penalty phase, and made a closing argument that, Petitioner submits, is incredibly and grossly improper and ineffective in the circumstances. It is appropriate that the argument be reproduced in its entirety.

> Ladies and gentlemen, it's been a long trial. You've sat and listened to the evidence and you've made your decision. I don't believe that any one of you would like to take a man's life and I think you'll do what's proper. I know you are people of conviction, and if it's required, then that's what you'll do. If you don't think it's required you will not. I know that none of you will make this decision lightly. I have absolutely nothing to say to you in regard to it. I do not envy you having to make the decision. And I trust that you will deliberate now and reach what you feel is proper in this case. Thank you. (T. 1012-13)

The jury found only one aggravating circumstance (pecuniary gain) and no mitigating circumstances, although Petitioner was twenty years of age and there was no evidence presented of any significant history of prior criminal activity, both of which are statutory mitigating circumstances. And, of course, the jury sentenced Petitioner to death, so prejudice, it is submitted, may be shown.

The penalty phase of a capital trial is equally as important as the guilt phase. Gardner v. Florida. 430 U. S. 349 (1977). Lockett v. Ohio. 438 U. S. 586 (1978). Eddings v. Oklahoma. (U. S. Sup. Ct., 1982). A defendant's rights to due process, equal protection, fair trial and effective assistance of counsel are as applicable here as in the guilt phase. In the case at bar, not only did counsel present no evidence, he also told the jury, as it was to go into deliberation as to whether his client would live or die: "I have absolutely nothing to say to you in regard to it."

Petitioner's trial counsel dictated certain remarks into the record, after the jury retired to consider punishment, that he had discussed with Petitioner the possible introduction of mitigating circumstances after the guilty verdict was rendered. Counsel stated that he had a witness available who would state that Petitioner was under the influence of drugs or alcohol, but that Petitioner refused to let the witness testify, and that he said for the jury just to proceed. (T. 1014).

There is no indication that Petitioner was present when these statements were made, and thus was not given an opportunity to rebut them. Petitioner's affidavit, attached hereto, states that he did not authorize the type of closing argument that was made. There is no record of any inquiry of Petitioner, by counsel or the court, of his right to testify in the penalty phase, or to present evidence, or otherwise informing him of his penalty phase rights, before the jury deliberated. The only recorded inquiry came after the jury returned with a death sentence and he was afforded his right of allocution:

> MR. WELLENBERGER: Do you have any reason you'd like to state to this court why you should not be sentenced at this time? Anything you want to say?
>
> MR. SINGLETON: What I want to say, someone done had the opportunity to say. (T. 1018) (Emphasis added).

This statement certainly connotes dissatisfaction with the "argument" that trial counsel rendered. An evidentiary hearing will develop for this Court's review fuller testimony on the following instances of prejudice, and others, supported by the record and accompanying affidavits.

A. Trial counsel did not prepare for the penalty phase. This is supported by, among other things, the absence of a presentation, by counsel's reference to a talk with Petitioner, during a "short" recess after the guilty verdict was found, and by the affidavits of Petitioner and his mother, Mrs. Howard.

B. Evidence was available for the penalty phase. In addition to his age, Petitioner refers to the affidavits of himself and his mother. The penalty phase statutes, Ark. Stat. Ann. 41-1301 et seq., are tailored so that mitigating circumstances are not limited to those specifically enumerated, that strict rules of evidence do not apply, and that they do not require a de facto admission of guilt in order to show mitigating circumstances. It is permissible to argue, in the penalty phase, to the effect that: "You have made your decision. We disagree with it, but we respect it in that it is the decision that you have made. Nonetheless, the next decision you have to make is whether Charles Singleton will die, and there are some things that we want to tell you about the person whose fate you are deciding. For instance...." Problems while growing up may be elicited and developed as mitigating circumstances. Eddings v. Oklahoma. Other witnesses were also available.

C. Petitioner did not in any way assent to the type of closing argument given, nor was he given an opportunity to rebut the assertion that he did. And, Petitioner would submit, the type of argument made falls short of the appropriate standard of competence and effectiveness for the circumstances. Neal v. State, 623 S.W. 2d 191 (1981).

D. Petitioner has shown a prima facie case of pre-

judice; he received the death penalty from this jury despite his age and the finding of only one aggravating circumstance.

Petitioner asserts that the sentence rendered from a proceeding of this nature cannot stand, and this Court should either summarily vacate the death sentence on these grounds, or remand the cause to the trial court for an evidentiary hearing as requested.

OTHER GROUNDS FOR VACATION OF THE JUDGMENT AND SENTENCE OF THE TRIAL COURT, OR FOR A HEARING

Petitioner asserts a number of other grounds for the vacation of his conviction and death sentence, each of which violates the Constitution or laws of the United States or the State of Arkansas, the requeisite standard for Rule 37.1(a). Petitioner seeks reversal of his conviction, or, in the alternative, a further evidentiary hearing on each.

1. The death sentence is unconstitutional because the only aggravting circumstance found to exist was defined arbitrarily, capriciously and vaguely, in violation of Godfrey v. Georgia , 446 U.S. 420 (1980).

Petitioner was convicted of capital murder under provisions of Ark. Stat. Ann. 41-1501(1)(a) for causing the death of Mary Lou York " under circumstances manifesting extreme indifference to the value of human life" during commission of a robbery. Of the statutory aggravting circumstances the only one found was that the crime was committed for "pecuniary gain." Ark. Stat. Ann. 41-1301 et seq. The robbery element of the underlying felony was used as the aggravating circumstance justifying the death sentence. The Eighth and Fourteenth Amendments prohibit the bootstrapping of a felony murder comviction into a death sentence. For that reason, Petitioner's death sentence must be vacated and Petitioner awarded a new sentencing hearing.

A capital jury, if it determines that a defendant is guilty of a capital crime, must determine whether, in

the individualized circumstances of the offense and the defendant, whether the sentence of death is appropriate. Woodson v. North Carolina, 428 U.S. 280 (1976). A constitutional statute must provide clear guidance to the sentencing jury that this decision not be arbitrary and capricious. Gregg v. Georgia, 428 U.S. 153 (1976).

In Godfrey, the death sentence was reversed because the aggravting circumstance was not clearly defined to permit the sentencing jury, through the exercise of discretion, to distinguish between those deserving of the death penalty and those who were not. Godfrey's language includes the following phrases: "clear and objective standards", specific and detailed guidance" and "make rationally revieable the process." The exact same reasoning mandates reversal of the death penalty in this case.

By definition, pecuniary gain would include all robbery murders. This aggravting circumstance automatically permits the death penalty to be rendered in every robbery murder case and thus provides only illusory guidance to the jury in its sentencing function. Such unfettered discretion violates the Eighth Amendment as well as due process. Furman v. Georgia, 408 U.S. 238 (1972).

Because pecuniary gain was the jury's only basis for determining that Petitioner as a robbery murder defendant should be sentenced to death, the sentencing jury was left without a meaningful basis for performing its sorting function. The jury did not exercise any guided and rational discretion to determine whether the death penalty was the appropriate punishment, but rather, in effect, automatically meted it out in violation of Woodson v. North Carolina 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976).

2. The Arkansas stautory scheme is void for vagueness and violative of rights of due process and fair trial in

respects including the following: impermissible overlap between the definitions of capital murder in the course of a felony (Ark. Stat Ann. 41-1501 (1)(a) and first degree murder in the course of a felony (Ark. Stat. Ann. 41-1502(1)(a)), thus defining two crimes identically but with different punishments and giving the prosecutor unconstitutional unbridled discretion; vagueness as to what is meant by "extreme indifference to the value of human life"; vagueness as to what is meant by the aggravating circumstance of pecuniary gain.

3. The death sentence violates the prohibition on the Eighth Amendment against cruel and unusual punishments.

4. The death penaly here is violative of Arkansas law in that the jury ignored evidence of mitigating circumstances, in violation of Giles v. State 549 S.W. 2d 479 (1977), and rights of due process as well.

5. The conviction is unconstitutional because Petitioner was arrested and certain evidence seized in violation of his rights under the Fourth and Fourteenth Amendments.

6. The death sentence is unconstiutional because Petitioner was denied trial by jury selected from a cross-section of the community. The death qualified jury, besides depriving a defendant of a cross-section of the community, is more likely to convict, as the Plaintiff's record in the pending Grigsby v. Mabry litigation in the U.S. District Court (E.D. of Ark.) indicates. Trial counsel made these objections at trial, but Petitioner further submits counsel was ineffective in not having an evidentiary hearing on this point.

7. The death sentence is unconstitutional becase venireman Green, as referred to above, was improperly excused for cause under Witherspoon, and counsel was ineffective in assenting to his dismissal for cause. Moreover, Petitioner submjts that a number of the others excluded for cause were done so improperly, and, alternatively,

that counsel was ineffective in not making the appropriate record that they were not excusable.

8. The manner in which the jury was selected was also unconsitutional, prejudicial, and discriminatory, both in appication and result, in violation of his rights to due process, equal protection and fair trial.

Petitioner is black. Mrs. York was white as were all members of the jury, and, Petitioner submits,-most members of the panel. Certainly the result is facially discriminatory. Ford v. State, 276 Ark. 98 (1982). Ford's allegation of racial discriminationin the jury selection process was rebuffed for lack of an adequate record. Petitioner seeks the opportunity to develop a record so this Court may determine, as Petitioner alleges, that the jury was the product of an unconstitutional and discriminatory process.

The record must reflect the demographic and racial makeup of the county, how the pool of jurors was created, the racial makeup of the pool, the racial identity, as best as can be ascertained, of the persons summoned to the courthouse, excused for cause or peremptorily challenged. Petitioner is, at this juncture, able to demonstrate a result consistent with a prejudicial process, but needs an opportunity to prove cause. Petitioner submits that trial counsel was ineffective in not making such a record.

Petitioner further submits that the jury was selected in a manner discriminatory as to economic class. Trial counsel moved to quash the jury panel because the sheriff was instructed to contact prospective jurors on short notice. As counsel stated, those not at home during working hours, or those without telephone service, were excluded. (T. 753).

Petitioner also asserts that the summoning of the jury was clearly a conflict of interest. The sheriff is the chief law enforcement officer of the county. Additionally, he and his deputies are charged with the duty of summoning prospective jurors. Prejudice will result when the act

of summoning jurors goes beyond the ministerial function of calling a list of persons and into the discretionary sphere of deciding, by commission or omission, which persons to summon. This, plus defects in the county's method of creating the pool of potential jurors, mandates reversal.

Petitioner, although cognizant of this Court's position that Rule 37 is not a substitute for appeal, renews those points argued on appeal and those argued at trial but not specifically on appeal, noting that this Court said in affirming the sentence that "We have examined all objections and find no error." Specifically, Petitioner states that the following happened in violation of the U.S. or state Constitutions or federal or state law: admission of "dying declarations" that were untrustworthy and violative of rights of fair trial, due process and confrontation; introduction of photographs despite stipulation that they were not necessary; no proof that the homicide occurred during the course of a robbery; insuffiency of evidence to support conviction; denial of the motion for change of venue despite proof of prejudice.

Moreover, the failure of the Court to exclude the four jurors for cause and argued on appeal violates Petitioner's rights to a fair and impartial jury, and references in the record to an "outburst" of some sort, without further development of what it was, mandates an evidentiary hearing.

WHEREFORE, Petitioner prays that this Court grant a stay of execution pending disposition on the merits; and that the Court vacate Petitioner's conviction and sentence or remand the cause to the Ashley Circuit Court for a hearing pursuant to Rule 37.

JEFF ROSENZWEIG
420 Three Hundred Spring Bldg.
Little Rock, Arkansas 72201
(501) 372-5247

Attorney for Petitioner

AFFIDAVIT

I, Mildred Howard, after being duly sworn, hereby state and depose the following:

I am the mother of Charles Laverne Singleton. I was not called as a witness for my son Charles during the penalty phase of his trial in Ashley County Circuit Court, although I did testify in the first part of his trial. I was not consulted about possibly testifying in the penalty phase of the trial, and I was not made aware until after the trial that I could have testified on behalf of my son in the penalty phase.

If I had been called to testify in the penalty phase of the trial, there are a number of things that I would have testified about. For instance, I would have testified about his age, and about some of the good things which he had done for me and for other people in my family and around the town. I would also have testified about many of the problems which he had while growing up, including our poor finances and his emotional problems. I would also have testified that he tried to be a hard worker, and I would have asked the jury to spare my son's life.

There are also a number of matters concerning Charles' mental problems and reactions to stress that I am aware of, and to which I could have testified about if asked.

Mildred Howard
MILDRED HOWARD

State of Arkansas)
)
County of Ashley)

SUBSCRIBED AND SWORN TO BEFORE ME this 17 day of May, 1982.

Kathy Lou Nanley
NOTARY PUBLIC

MY COMMISSION EXPIRES:
1-1-85

AFFIDAVIT

I, Charles Laverne Singleton, after being duly sworn, do state and depose the following:

1. That I am currently incarcerated on Death Row of the Cummins Unit of the Arkansas Department of Correction under sentence of death from Ashley Circuit Court.

2. That I am indigent and that my counsel is serving without compensation.

3. That I was present at my trial, and that I am black and the members of the jury that convicted me were all white. I feel that I did not receive a fair trial.

4. That my lawyer did not explain to me the various types of evidence that could be brought out in the penalty phase of a trial. I would have wanted my mother to testify on my behalf in the penalty phase if it had been explained to me about what mitigating circumstances could have been introduced, and that I did not consent in any way to my attorney giving the type of closing argument that he did in which he declined even to ask the jury to spare my life. If it had been explained to me at the time, I might have testified on my behalf in the penalty phase.

Charles Singleton
CHARLES LAVERNE SINGLETON

SUBSCRIBED TO AND SWORN BEFORE ME, THIS 25 DAY OF MAY, 1982

My commission expires:
10-30-89

[illegible]
NOTARY PUBLIC

I certify that this Petition is filed in good faith and not for purposes of delay.

Jeff Rosenzweig

JEFF ROSENZWEIG
Attorney for Petitioner

STATE OF ARKANSAS
COUNTY OF PULASKI

SUBSCRIBED TO AND SWORN BEFORE ME THIS 25th DAY OF MAY, 1982.

Janice Lyster

My commission expires:
April 22, 1990

Notary Public

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have served a true and correct copy of the foregoing upon the office of Victra L. Fewell, Assistant Attorney General, Justice Building, Little Rock, Ark. this 25 day of May, 1982.

Jeff Rosenzweig

JEFF ROSENZWEIG

IN THE SUPREME COURT OF ARKANSAS

CHARLES LAVERNE SINGLETON — PETITIONER

VS. NO. CR-80-69

STATE OF ARKANSAS — RESPONDENT

WAIVER OF RESPONSE TO PETITION FOR STAY OF EXECUTION AND MOTION FOR 10 DAY BRIEF TIME TO RESPOND TO RULE 37 PETITION

Comes respondent, State of Arkansas, by its attorneys, Steve Clark, Attorney General, and Victra L. Fewell, Assistant Attorney General, and for its response to the petitions, states:

I.

On May 25, 1982, petitioner filed a petition for stay of execution and a petition for permission to proceed pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Cum. Supp. 1981).

II.

Respondent concurs in petitioner's statement of the history of the case, as set forth in paragraphs I and II of the petition to proceed under Rule 37.

III.

It is respondent's understanding that the Court has requested that respondent file its response to the Rule 37 petition by Friday, May 28, 1982, so that both the petition and response can be submitted with the petition for stay of execution.

IV

Since petitioner's execution date is now set for June 4, 1982, only a little more than a week from the date of the filing of the petitions, it would seem imperative that the Court consider the petition for stay of execution as expeditiously as possible. It is in the interest of the State that the petition for stay be reviewed and acted upon as soon as possible, as preparations for execution begin approximately one week prior to the execution date.

V.

The state hereby waives its right to respond to the petition for stay of execution.

VI.

Petitioner has raised approximately 21 issues in the Rule 37 petition. It would be very difficult for respondent to adequately review the record, research 21 issues and file its response by Friday, May 28.

VII.

Respondent is allowed by S. Ct. R. 3, Ark. Stat. Ann. Vol 3A (Repl. 1979) to have 10 days to respond to any motion filed in this Court. It is respondent's understanding that this rule has been applied to petitions to proceed pursuant to Rule 37.

VIII.

Respondent needs the full 10 days to respond to the lengthy petition.

WHEREFORE, respondent respectfully requests that this Court expeditiously consider the petition for stay of execution and allow it the full 10 days to respond to the petition for permission to proceed pursuant to Rule 37.

Respectfully submitted,

STEVE CLARK
ATTORNEY GENERAL

By: Victra L. Fewell
VICTRA L. FEWELL
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Victra L. Fewell, Assistant Attorney General, do hereby certify that a copy of the foregoing pleading has been served on petitioner herein, by mailing a copy of same, postage prepaid, addressed to his attorney Jeff Rosenzweig, Attorney at Law, 420 Three Hundred Spring Building, Little Rock, Arkansas 72201, this 25th day of May, 1982.

Victra L. Fewell
VICTRA L. FEWELL

BE IT REMEMBERED. That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 19 81, amongst others were the following proceedings, to-wit:

On the 1st day of June, A. D. 19 82, a day of said term

CHARLES LAVERNE SINGLETON

APPELLANT

No. CR80-69 vs.

STATE OF ARKANSAS

APPELLEE

Appeal from Ashley Circuit Court

District

Petition for permission to proceed pursuant to Criminal Procedure Rule 37 is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated. I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 1st day of June, A.D. 19 82.

Dona L. Williams
CLERK

By
D. C.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 19 81, amongst others were the following proceedings, to-wit:

On the 1st day of June, A. D. 19 82, a day of said term

CHARLES LAVERNE SINGLETON

APPELLANT

No. CR80-69 vs.

STATE OF ARKANSAS

APPELLEE

Appeal from Ashley

Circuit Court

District

Petitioner's motion for stay of execution is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated. I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 1st day of June, A.D. 19 82.

Dona L. Williams
CLERK

By _____ D. C.

82-5147

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES LAVERNE SINGLETON — Petitioner

vs.

STATE OF ARKANSAS — Respondent

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

JEFFREY M. ROSENZWEIG
420 Three Hundred Spring Bldg.
Little Rock, Ark. 72201
(501) 372-5247

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES LAVERNE SINGLETON,
Petitioner

VS.

STATE OF ARKANSAS,
Respondent

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Charles Laverne Singleton, by his undersigned counsel, asks leave to file the petition for writ of certiorari without payment of costs and to proceed in forma pauperis, and in support hereof states:

1. An affidavit indicating petitioner's indigency is attached hereto.

2. Petitioner was declared indigent at the trial court level, and continued in that fashion on appeal to the Arkansas Supreme Court.

3. Petitioner is confined on death row in the Cummins Unit of the Arkansas Department of Correction.

4. Present counsel is serving pro bono publico.

WHEREFORE, Petitioner prays that this application be granted.

Respectfully submitted,

JEFFREY M. ROSENZWEIG
420 Three Hundred Spring Bldg.
Little Rock, Ark. 72201
(501) 372-5247

Counsel for Petitioner

Dated: February 17, 1982

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Application for leave to proceed in forma pauperishas been furnished by first class mail, postage prepaid, to the office of the Attorney General, State of Arkansas, Attn: Victra Fewell, State Capitol Grounds, Little Rock, Ark. 72201 this 17 day of February, 1982.

Jeffrey M. Rosenzweig

JEFFREY M. ROSENZWEIG

420 Three Hundred Spring Bldg.
Little Rock, Ark. 72201
(501) 372-5247

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES LAVERNE SINGLETON, Petitioner, v. THE STATE OF ARKANSAS, Respondent,	Case No. _____ AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

STATE OF ARKANSAS)
)ss.
COUNTY OF LINCOLN)

I, Charles Laverne Singleton, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe that I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed?

Yes_____ No✓_____

a) If the answer is "yes" state the amount of your salary or wages per month, and give the name and address of your employer.

_____

b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received.

1979 - $120 a week

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or form of self-employment?

Yes____ No✓

b. Rent payments, interest or dividends?

Yes____ No✓

c. Pensions, annuities or life insurance payments?

Yes____ No✓

d. Gifts or inheritances?

Yes____ No✓

e. Any other sources?

Yes✓ No____

If the answer to any of the above is "yes" describe each source of money and state the amount received during the past twelve months:

Received from family - necessity ($50)

3. Do you own cash, or do you have money in checking or savings accounts? (Including any funds in prison accounts.)

Yes____ No✓

If the answer is "yes" state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Yes_____ No__✓__

If the answer is "yes," describe the property and state its approximate value.

_____

5. List the persons who are dependent on you for support, state your relationship to those persons and indicate how much you contribute to their support.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Charles Singleton

Charles Laverne Singleton

STATE OF ARKANSAS)
)ss.
COUNTY OF LINCOLN)

Charles Laverne Singleton, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Charles Singleton

Charles Laverne Singleton

Subscribed and sworn to before me this 16 day of Jan, 1982.

Jackie D. Sanders
Notary Public

My commission expires: Oct 20, 1989